Federal Express Brokerage Sdn Bhd & Ors v Malaysia Airports (Sepang) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–3327 OF 2010
ZAINUN ALI, RAMLY ALI AND ANANTHAM KASINATHER JJCA
13 DECEMBER 2011

Administrative Law — Subsidiary legislation — Commencement of — Retrospective effect — Regulation 8A provides power to impose and collect FCZ charges — Whether Free Zones Act 1990 expressly confer any power to Minister of Finance to legislate retrospectively — Whether reg 8A only came into force prospectively and not retrospectively — Free Zones Act 1990 s 47 — Free Zones Regulations 1991 reg 8A — Interpretation Acts 1948 and 1967 ss 19(1) & 20

Administrative Law — Subsidiary legislation — Ultra vires — Whether Minister acted beyond his powers conferred by Free Zones Act 1990 — Whether Free Zones Act 1990 empowered Minister to make regulations for imposing FCZ charges — Whether reg 8A of the Free Zones Regulations 1991 ultra vires the Free Zones Act 1990 — Free Zones Act 1990 ss 10(3) & 13(2) — Free Zones Regulations 1991 reg 8A

Civil Procedure — Declaratory reliefs — Declaration of right — Invalidity of imposition of FCZ charges — Appeal — Statutory provisions allowing such imposition — Minister of Finance decided to maintain charge for FCZ at the KLIA — Whether Minister of Finance had legal power to impose charges — Whether reg 8A of the Free Zone (Amendment) Regulations 2007 which forms basis of imposition of FCZ charges ultra vires the Free Zones Act 1990) and therefore invalid — Free Zone Act 1990 ss 10(3) &13(2) — Free Zones Regulations 1991 reg 8A

Revenue Law — Imposition of — Free Commercial Zone (FCZ) charges — Minister of Finance decided to maintain charge for FCZ at KLIA — Whether Minister of Finance had legal power to impose charges — Whether reg 8A of the Free Zone (Amendment) Regulations 2007 which forms basis of imposition of FCZ charges ultra vires the Free Zones Act 1990 — Free Zone Act 1990 ss 10(3) & 13(2) — Free Zones Regulations 1991 reg 8A

Statutory Interpretation — Revenue statute — Construction of — Statute imposing FCZ charges — Whether required clearest words for imposing financial

obligation — Whether must receive strict construction from wordings of the statute — Free Zones Act 1990 ss 10(3) & 13(2) — Free Zones Regulations 1991 reg 8A

The appellant was appealing against the decision of the trial judge which had dismissed the appellant's claim against the respondents for among others, certain declaratory reliefs with regard to the invalidity of the imposition of the Free Commercial Zone ('FCZ') charges by the first respondent; and allowing the first respondent's counterclaim against the appellants. The trial court, in doing so, held that the appellants were liable to make payment for the a wears of the FCZ charges to the first respondent together with interest. In the above case, the Ministry of Finance had, on 18 May 2007, issued a letter to the chairman of Air Freight Forwarder Association of Malaysia ('AFAM') notifying him that the Minister of Finance had decided to maintain the charge for the FCZ at the KLIA at RM5 per declaration using specified customs declaration forms. In the same letter the Ministry of Finance sought AFAM's assistance to request its members (including the appellants) to pay and settle the arrears of the FCZ charges amounting to RM24,092,834 outstanding to the authority (the first respondent) to enable the Authority to continue administering the FCZ. The appellants refused to pay the charges imposed. They contended that the respondents were not allowed to arbitrarily impose the FCZ charges which they viewed as excessive and ultra vires the Free Zone Act 1990 ('Act') as there were no statutory provisions under the Act and/or the Free Zones Regulations 1991 which allow for such imposition by the first respondent. The appellants commenced the present action against the respondents in the High Court seeking, inter alia, for a declaration that the letter issued by the Ministry of Finance namely dated 18 May 2007 was void ab initio and/or contrary to the provisions of the law and a declaration that the respondents had no authority to collect any monies with regards to the FCZ charges. The first respondent counterclaimed against the appellants for the alleged outstanding FCZ charges due as at 7 April 2008. The respondents contended that the appellants' refusal to pay the FCZ charges was baseless and unlawful; and the demands for payment of the FCZ charges made by the Minister of Finance and the first respondent were lawful. Alternatively, the first respondent stated that the sums of monies owed were reasonable, which the first respondent was entitled to claim by way of quantum merit and pursuant to s 71 of the Contracts Act 1950. The trial judge found that the FCZ charges imposed prior to 20 April 2007 was not illegal as it was based on ss 10(3) and 13(2) of the Act. The trial judge also concluded that the Minister of Finance had the power to impose FCZ charges even prior to 27 April 2007; the Minister had decided that the charges be imposed at the rate of RM5 per declaration and based on the evidence adduced, the learned judge was satisfied that the rate imposed was reasonable. The issues before this court were as follows: (a) whether the Minister of Finance had legal power to impose charges on the members of AFAM (including the appellants) in relation of the FCZ in KLIA; and (b) whether reg 8A of the Free Zone (Amendment) Regulations 2007 which forms

the basis of the imposition of the FCZ charges was ultra vires the parent Act (the Act) and therefore invalid. A

Held, allowing the appeal with costs:

(1) It is a well settled principle of law that imposition any form of tax, duty, charge, levy, fee or other forms of financial obligations on any person must be expressly provided for in a statute passed by the Parliament or the relevant legislative body. Such imposition must be expressed in plain and unambiguous language in the particular statute. In the absence of clear intention in the law that tax, duty or charge should be imposed, the appellants (in the present case) were not liable to pay the charge imposed on them (see paras 16 & 22). B C

(2) The language of both ss 10(3) and 13(2) of the Act on the face of it does not show any intention on the part of the Parliament to confer on the Minister of Finance a discretion or power to impose any charge or levy in respect of activities carried in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ. Clearly, the provisions of ss 10(3) and 13(2) of the Act do not express in plain and unambiguous language, the intention of Parliament to provide powers to the Minister to impose such charges in the free zone (see para 26). D E

(3) The Minister of Finance had no legal power to impose charges on the members of AFAM (including the appellants) in relation of the FCZ in KLIA. Consequently, the charges which were imposed on them as directed by the Ministry official in the letter dated 18 May 2007 were without legal basis and unlawful (see para 30). F

(4) It necessarily follows that reg 8A of the Free Zones Regulations 1991 which came into force on 20 April 2007 (by way of gazette PU (A) 166/2007) was in turn ultra vires the Act. Further, the commencement date of reg 8A was on 20 April 2007, the date immediately following the date of its publication. Section 47 of the Act which is the enabling section for the Regulations, does not expressly confer any power to the Minister of Finance to legislate retrospectively. Therefore, the inevitable conclusion is that the said reg 8A, assuming it to be legally valid, can only come into force prospectively and not retrospectively (see para 36). G H

(5) As the first respondent's counterclaim against the appellants consists of FCZ charges pre-dating back the Free Zone (Amendment) Regulations 2007, the imposition of the said charges retrospectively by the first respondent prior to the effective date of 20 April 2007 was ultra vires the Act and the Regulations. The learned High Court judge had erred in allowing the first respondent's counterclaim against the appellants (see para 43). I

(6) The letter dated 18 May 2007 from the Ministry of Finance was merely an administrative communication between the official of the Ministry of Finance and the Chairman of AFAM on the same subject matter. It was neither a legal direction nor a subsidiary legislation. Obviously the said letter could not be used as a basis for the imposition of the FCZ charges as had been done in the present case. The RM5 rate for each declaration form as imposed in the said letter and the amount of RM24,092,834 alleged to be arrears of the FCZ charges clearly have no legal effect and do not create any liability on the members of AFAM including the appellants to pay (see para 44).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan hakim bicara yang menolak tuntutan perayu-perayu terhadap responden-responden untuk, antara lain, relief-relief deklarasi tertentu berkaitan dengan ketaksahan pengenaan caj Zon Komersial Bebas (ZKB) oleh responden pertama; dan membenarkan responden pertama menuntut balas terhadap perayu-perayu. Mahkamah bicara, dalam berbuat demikian memutuskan bahawa perayu-perayu bertanggungjawab untuk membuat bayaran untuk caj ZKB kepada responden pertama berserta dengan faedah. Di dalam kes di atas, Kementerian Kewangan telah, pada 18 Mei 2007, mengeluarkan surat kepada Pengerusi Air Freight Forwarder Association of Malaysia ('AFAM') memberitahunya bahawa Kementerian Kewangan telah memutuskan untuk mengekalkan caj bagi ZKB di KLIA pada kadar RM5 bagi setiap deklarasi menggunakan borang deklarasi kastam yang spesifik. Di dalam surat yang sama Kementerian Kewangan meminta bantuan AFAM untuk meminta ahli-ahlinya (termasuk perayu-perayu) membayar dan menyelesaikan tunggakan caj ZKB sejumlah RM24,092,834 yang terhutang kepada pihak berkuasa (responden pertama) untuk membolehkan pihak berkuasa terus mentadbir ZKB. Perayu-perayu enggan membayar caj yang dikenakan. Mereka menghujah bahawa responden-responden tidak dibenarkan secara sewenang-wenangnya mengenakan caj ZKB yang mereka dapati adalah berlebihan dan *ultra vires* Akta Zon Bebas 1990 ('Akta') kerana tidak ada peruntukan statutori di bawah Akta dan/atau Peraturan-Peraturan Zon Bebas 1991 yang membenarkan pengenaan sedemikian oleh responden pertama. Perayu-perayu memulakan tindakan ini terhadap responden-responden di Mahkamah Tinggi memohon, antara lain, untuk deklarasi bahawa surat yang dikeluarkan oleh Kementerian Kewangan iaitu yang bertarikh 18 Mei 2007 adalah batal ab initio dan/atau bertentangan dengan peruntukan undang-undang dan satu deklarasi bahawa responden-responden tidak ada kuasa untuk menerima apa-apa wang berkaitan dengan caj ZKB. Responden pertama menuntut balas terhadap perayu-perayu bagi caj ZKB tertunggak yang didakwa yang perlu dibayar setakat 7 April 2008. Responden-responden menghujah bahawa keengganan perayu-perayu untuk membayar caj ZKB adalah tidak beralasan dan tidak sah; dan tuntutan untuk pembayaran caj ZKB yang dibuat oleh Kementerian

Kewangan dan responden pertama adalah sah. Secara alternatif, responden pertama menyatakan bahawa jumlah wang yang dihutang adalah munasabah, yang responden pertama berhak menuntut secara *quantum meruit* dan berikutan s 71 Akta Kontrak 1950. Hakim bicara mendapati bahawa caj ZKB yang dikenakan sebelum 20 April 2007 adalah tidak sah kerana ia berdasarkan ss 10(3) dan 13(2) Akta. Hakim bicara juga memutuskan bahawa Menteri Kewangan mempunyai kuasa untuk mengenakan caj ZKB walaupun sebelum 27 April 2007; Menteri telah memutuskan bahawa caj yang dikenakan pada kadar RM5 bagi setiap deklarasi dan berdasarkan kepada keterangan yang dikemukakan, hakim yang bijaksana berpuas hati bahawa kadar yang dikenakan adalah munasabah. Isu-isu di hadapan mahkamah ini adalah seperti berikut: (i) sama ada Menteri Kewangan mempunyai kuasa undang-undang untuk mengenakan caj kepada ahli-ahli AFAM (termasuk perayu-perayu) berkaitan dengan ZKB di KLIA; dan (b) sama ada peraturan 8A Peraturan-Peraturan Zon Bebas (Pindaan) 2007 yang membentuk asas pengenaan caj ZKB adalah *ultra vires* Akta induk (Akta) dan oleh itu tidak sah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah prinsip undang-undang matan bahawa pengenaan apa-apa bentuk cukai, duti, caj, levi, fi dan apa-apa bentuk kewajipan kewangan atau seseorang mesti diperuntukkan secara jelas di dalam statut yang diluluskan oleh Parlimen atau badan perundangan yang relevan. Pengenaan sedemikian mesti ringkas dan dalam bahasa yang jelas dalam statut tersebut. Dalam ketiadaan niat yang jelas dalam undang-undang bahawa cukai, duti atau caj perlu dikenakan, perayu-perayu di dalam kes ini tidak bertanggungan untuk membayar caj yang dikenakan terhadap mereka (lihat perenggan 16 & 22).

(2) Bahasa kedua-dua ss 10(3) dan 13(2) Akta jelas tidak menunjukkan apa-apa niat pada pihak Parlimen untuk memberikan Menteri Kewangan budi bicara atau kuasa untuk mengenakan apa-apa caj atau levi berkaitan dengan aktiviti-aktiviti yang dilakukan di ZKB tetapi semata-mata memohon untuk memperuntukkan jenis aktiviti-aktiviti dan pentadbiran yang boleh dibenarkan di ZKB. Jelas peruntukan ss10(3) dan 13(2) Akta tidak menyatakan dalam bahasa yang ringkas dan jelas, niat Parlimen untuk memberikan kuasa kepada Menteri untuk mengenakan caj sedemikan di dalam zon bebas tersebut (lihat perenggan 26).

(3) Menteri Kewangan tidak mempunyai kuasa undang-undang untuk mengenakan caj kepada ahli-ahli AFAM termasuk perayu-perayu berkaitan dengan ZKB di KLIA. Dengan itu, caj yang dikenakan ke atas mereka seperti yang diarahkan oleh pegawai Kementerian di dalam surat yang bertarikh 18 Mei 2007 adalah tanpa asas undang-undang dan tidak sah (lihat perenggan 30).

(4) Berikutan itu peraturan 8A Peraturan-Peraturan Zon Bebas 1991 yang berkuatkuasa pada 20 April 2007 (melalui warta PU(A) 166/2007) adalah sebaliknya *ultra vires* Akta tersebut. Selanjutnya, permulaan tarikh peraturan 8A adalah pada 20 April 2007, tarikh selepas tarikh penerbitannya. Seksyen 47 Akta yang merupakan seksyen pemungkin bagi peraturan tersebut, tidak secara langsung memberikan apa-apa kuasa kepada Menteri Kewangan untuk membuat perundangan secara kebelakang. Oleh demikian, kesimpulan yang tidak boleh dielakkan adalah bahawa peraturan 8A, dengan anggapan ia adalah sah, hanya boleh berkuat kuasa secara ke hadapan dan bukan kebelakang (lihat perenggan 36).

(5) Oleh sebab tuntutan balas responden pertama mengandungi caj ZKB bertarikh kebelakang Peraturan-Peraturan Zon Bebas (Pindaan) 2007, pengenaan caj tersebut secara kebelakang oleh responden pertama sebelum tarikh kuat kuasa 20 April 2007 adalah *ultra vires* Akta dan peraturan tersebut. Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam membenarkan tuntutan balas responden pertama terhadap perayu-perayu (lihat perenggan 43).

(6) Surat bertarikh 18 Mei 2007 daripada Kementerian Kwangan adalah semata-mata komunikasi pentadbiran di antara pegawai Kementerian Kewangan dan Pengerusi AFAM atas subjek perkara yang sama. Ia bukan arahan undang-undang dan bukan perundangan subsidiari. Jelas surat tersebut tidak boleh digunakan sebagai asas untuk pengenaan caj ZKB seperti yang telah dilakukan di dalam kes ini. Kadar RM5 bagi setiap borang deklarasi seperti yang dikenakan di dalam surat tersebut dan jumlah RM24,092,834 yang didakwa tunggakan caj ZKB jelas tidak mempunyai kesan undang-undang dan tidak membentuk apa-apa liabiliti kepada ahli-ahli AFAM termasuk perayu-perayu (lihat perenggan 44).]

Notes

For cases on declarations of right, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1029–1032.

For cases on revenue statutes in general, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2078–2079.

For cases on ultra vires, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1029–1032.

Cases referred to

Athlumney, Re [1898] 2 QB 547, QBD (refd)

Attorney-General v Wilts United Dairies Ltd (1921) 37 TLR 884; [1922] 38 TLR 781, CA (refd)

Comptroller-General of Inland Revenue, Malaysia v T [1970] 2 MLJ 35, FC (refd)

Gosling v Veley (1850) 12 QB 328, HL (refd)
Gruen Watch Co Ltd v Attorney General of Canada [1950] OR 429, SC (refd)
Kerajaan Malaysia v Wong Pet Heng & Anor [1997] 2 CLJ 188, FC (refd)
Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2010] MLJU 1524; [2011] 7 CLJ 46, HC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (folld)
Phillips v Eyre (1870) LR 6 QB 1, CA (refd)
Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292, CA (refd)
Syed Ibrahim bin Syed Mohd & Ors v ESSO Production Malaysia Incorporated & anor appeal [2004] 1 CLJ 880, CA (refd)
United Asian Bank Bhd v The Negeri Sembilan Development Corporation [1989] 1 MLJ 230, HC (folld)

Legislation referred to

Contracts Act 1950 s 71
Free Zones Act 1990 ss 3(1), (2), 10(2), (3), 13, 13(1), (2), 47
Free Zones (Amendment) Regulations 2007 reg 8A
Free Zones Regulations 1991 reg 8A
Interpretation Acts 1948 and 1967 ss 19, 19(1), 20

Appeal from: Civil Suit No R1–22–02 of 2008 (High Court, Kuala Lumpur)

Elaine Yap (Mohd Arief, Emran Arifin and Azmimi Pharmy with her) (Wong & Partners) for the appellants.
Jasmeetpal Singh (Siew & Jasmeet) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] The appellants were the plaintiffs at the court below. The present appeal is against the decision of the learned High Court judge dated 15 October 2010 dismissing the appellant's claim against the respondents for among others, certain declaratory reliefs with regard to the invalidity of the imposition of the free commercial zone ('FCZ') charges by the first respondent; and allowing the first respondent's counterclaim against the appellants and in doing so, held that the appellants are liable to make payment for the a wears of the FCZ charges to the first respondent together with interest at the rate of 8%pa from 7 April 2008 to the date of full payment.

FACTUAL BACKGROUND

[2] The appellants at the material times were companies incorporated in

Malaysia and were members of the Air Freight Forwarder Association of Malaysia ('AFAM') as well as the Conference of Asia Pacific Express Carriers ('CAPEC'). The appellants had been operating in the KLIA FCZ since 1997 when it was first set up.

[3] The respondents at all material times were also companies incorporated in Malaysia. The second respondent a wholly owned subsidiary of Malaysia Airport Holdings Bhd.

[4] Sometimes in 1996, AFAM was informed by Malaysia Airport Bhd that a Kuala Lumpur International Airport Free Commercial Zone (FCZ) would be established with the objective of reducing paperwork for inbound and outbound cargo shipments. The establishment of the arrears of the FCZ was also to be in line with the change of environment in international freight movements.

[5] Accordingly, the FCZ was duly established under s 3(1) of the Free Zone Act 1990 to administer, maintain and operate the free zone. The minister in charge under the said Act is the Minister of Finance. On 19 August 1997, the Minister of Finance appointed the first respondent as the authority to administer, maintain and operate the free zone at the Kuala Lumpur International Airport Cargo Village under s 3(2) of the Act. The authority acts on the directions of and answerable to the Minister of Finance.

[6] In 2007, the Free Zones Regulations 1991 was amended vide the Free Zones (Amendment) Regulations 2007 (PU (A) 166/2007) which came into force on 20 April 2007. A new reg 8A was introduced in the said amendment. It provides for the imposition of free zone charge. The said reg 8A reads:

> where the Minister so directs, a free zone charge shall be payable by any person or his agent to the Authority in respect of every approved declaration under regulations 5, 21, 22, 23, 24, 25,26, 27 and 28.

Prior to the amendment (ie prior to 20 April 2007) there was no express provision either in the Act, or the 1991 Regulations regarding the imposition of any free zone charges.

[7] On 18 May 2007, the Ministry of Finance through one Datuk Aziyah Bahauddin, the secretary of the Tax Analysis Division issued a letter to the chairman of AFAM notifying him that the Minister of Finance had decided to maintain the charge for the FCZ at the KLIA at RM5 per declaration using specified customs declaration forms. In the same letter the Ministry of Finance sought AFAM's assistance to request its members ('including the appellants') to pay and settle the arrears of the FCZ charges amounting to RM24,092,834

outstanding as at 14 May 2007 to the authority ('the first respondent') to enable the authority to continue administering the FCZ.

[8] The contents of the said letter reference (C)0217/24 Vol 4(6) dated 18 May 2007 are reproduced below:

Y Bhg Encik Walter Culas

Pengerusi

Airfreight Forwarders Association of Malaysia

No. 16B, Tingkat 2

Jalan Kemuja, Bangsar Utama

59000 Kuala Lumpur No. Faks: 03-22872592

Tuan

Per: Cadangan CAPEC Bagi Caj Pemprosesan FCZ di KLIA

Dengan hormatnya saya adalah diarah merujuk kepada surat tuan bil. AFAM-MOF 2007/04/19 bertarikh 9 April 2007 mengenai perkara tersebut di atas.

2 Adalah dimaklumkan bahawa Kementerian ini telah mengambil perhatian keputusan Extra Ordinary Meeting (EGM) khas AFAM pada 18 April 2007 yang menolak cadangan CAPEC untuk mewujudkan 'two-tier' caj pemprosesan FCZ dan bersetuju mengelakkan caj pemprosesan FCZ 'single tier' yang ada sekarang.

3 Berhubung dengan perkara ini YB Menteri Kewangan telah memutuskan caj pemprosesan FCZ di Kawasan Perdagangan Bebas di KLIA, dikekalkan pada kadar RM5 bagi setiap deklarasi dengan menggunakan Borang Kastam yang telah ditetapkan.

4 Malaysia Airport (Sepang) Sdn Bhd (MAB) sebagai pihak berkuasa zon di Kawasan Perdagangan Bebas di KLIA telah melaporkan ke Kementerian ini bahawa amaun tertunggak caj pemprosesan FCZ pada 14 Mei 2007 adalah sebanyak RM24,092,834. MAB juga memaklumkan bahawa mereka tidak boleh beroperasi sekiranya menanggung kerugian dan akan hanya terus sanggup menjadi pihak berkuasa zon di FCZ KLIA sekiranya tunggakan tersebut dijelaskan.

5 Kerjasama pihak tuan adalah diminta supaya memastikan ahli-ahli di bawah naungan AFAM membuat bayaran serta menjelaskan tunggakan tersebut dengan segera kepada MAB untuk membolehkannya terus mentadbir kawasan FCZ di KLIA.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.

(Datuk Aziyah Bahauddin)

Setiausaha Bahagian Analisa Cukai

b.p. Ketua Setiausaha Perbendaharaan

[9] The appellants refused to pay the charges imposed. They contended that the respondents are not allowed to arbitrarily impose the FCZ charges which they viewed as excessive and ultra vires the Act as there are no statutory provisions under the Act and/or the Free Zones Regulations 1991 which allow for such imposition by the first respondent.

[10] The appellants commenced the present action against the respondents in the Kuala Lumpur High Court for amongst others, the following reliefs and orders:

(a) a declaration that the letter issued by the Ministry of Finance namely dated 18 May 2007 and 14 December 2007 is void ab initio and/or contrary to the provisions of the law;

(b) an order for the respondents to produce accounts of the money collected from the appellants as FCZ charges from year 2000 onwards;

(c) a declaration for the first respondent to return all monies collected from the appellants from year 2000 immediately;

(d) a declaration that the respondents have no authority to collect any monies with regards to the FCZ charges; and

(e) general, aggravated and exemplary damages.

[11] The first respondent counterclaimed against the appellants for the alleged outstanding FCZ charges due as at 7 April 2008 in the following amounts:

(a) the first appellant — RM5,529,185;

(b) the second appellant — RM2,963.640; and

(c) the third appellant — RM214,835.

[12] The respondents contended that the appellants' refusal to pay the FCZ charges is baseless and unlawful; and the demands for payment of the FCZ charges made by the Minister of Finance and the first respondent are lawful. The respondents submitted that the imposition of the FCZ charges had been decided upon and directed by the Minister of Finance and the Minister's direction on the imposition of the said charges had been in place even before the commencement of reg 8A; and this had been acknowledged by the

association, AFAM. Alternatively, the first respondent stated that the sums of monies owed are reasonable which the first respondent is entitled to claim by way of quantum merit and pursuant to s 71 of the Contracts Act 1950. The first respondent averred that at the material time the appellants, were justly and truly indebted to the first respondent.

[13] On 15 October 2010, after the full trial and submissions the learned High Court judge dismissed the appellant's claim and allowed the first respondent's counterclaim. In coming to her decision, the learned High Court judge found that the FCZ charges imposed prior to 20 April 2007 are not illegal as it was based on ss 10(3) and 13(2) of the Free Zones Act 1990. At p 11 (para 18) of her grounds of judgment the learned High Court judge held as follows:

> Section 10(3) empowers the Minister to impose such conditions he may deem fit in respect of any activity that the Minister may allow to be carried out in the free zone. The words 'any activity' would necessary refer to other activities not specifically mentioned in the First and Second Schedule. It is not disputed that the Plaintiffs' activities fall within the First Schedule. To my mind if section 10(3) allows the Minister to impose such conditions that he deems fit on activities carried out other than those mentioned in the First and Second Schedule, by necessary implication the Minister has the power to impose conditions he deems necessary in respect of activities mentioned in those Schedules. Such conditions must necessarily relate to the activities carried out. Counsel for the defendants submits that this would include imposition of FCZ charges, issuance of passes, licences and provision of overall security of the free zone.

[14] To strengthen the respondents' case, the learned High Court judge had also ruled that the Act imposes an obligation on the first respondent as the authority appointed by the Minister to administer, maintain and operate the KLIA FCZ; and s 13(2) of the Act imposes a mandatory obligation on the first respondent as the authority to comply with the directions given by the Minister of Finance. The learned High Court judge cited s 13(1)–(2) which reads:

> (1) the Minister may require the Authority to provide and maintain or allow in a free zone such facilities as he may consider necessary for the proper and efficient functioning of such zone; and
>
> (2) the Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone or for the purpose of protecting revenue; and the Authority shall comply with such directions.

[15] The learned High Court judge also concluded that the Minister of Finance has the power to impose FCZ charges even prior to 27 April 2007; the Minister has decided that the charges be imposed at the rate of RM5 per declaration and based on the evidence adduce the learned judge was satisfied

that the rate imposed was reasonable.

DECISION OF THIS COURT

[16] It is well settled principle of law that imposition any form of tax, duty, charge, levy, fee or other forms of financial obligations on any person must be expressly provided for in a statute passed by the Parliament or the relevant legislative body. Such imposition must be expressed in plain and unambiguous language in the particular statute.

[17] The law relating to this issue has been clearly adopted by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia & anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, where it was held, inter alia, that 'if a person is to be made liable for a tax, charge or levy, such liability must be expressed in plain and unambiguous language in the particular statute; if Parliament does not do so, then it is not open to a delegate of the power to impose the levy to make the identifications'.

[18] In that case, Gopal Sri Ram JCA (as he then was) stated:

> In Malaysia, the Federal Constitution has entrusted the law making power to Parliament and the State Assembly of each of the several States of the Federation. While the courts through the common law recognise the power of Parliament to delegate some of its legislative power, it is equally the constitutional duty of the courts to ensure that no excessive delegation takes place. Hence the well settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy — call it a tax or charge or cess or whatever you may — upon the whole or any section of the public.

[19] In the case of *Gosling v Veley* (1850) 12 QB 328, at p 407 Chief Justice Wilde ruled:

> The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, expect upon clear and distinct legal authority established by those who seek to impose the burthen, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.

[20] Parliament may pass Legislation (by an Act of Parliament) requiring the subjects to pay tax, charge, levy or other financial liabilities. Parliament may also delegate its powers of imposing such payments to the Executives, (including Minister), but for that purpose, the clearest words should be

required. This had been stressed by Scrutton LJ in the case of *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884; (1922) 38 TLR 781, where His Lordship said:

> It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view the clearest words should be required before the courts hold that such an unusual delegation has taken place.

[21] The intention of the Parliament to impose tax, duty or charge must strictly be construed from the wordings of the statute. It is a well settled principle of law that the wordings of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words, (see *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2010] MLJU 1524; [2011] 7 CLJ 46).

[22] In the absence of a clear intention in the law that tax, duty or charge should be imposed, the appellants (in the present case) are not liable to pay the charge imposed on them. The decision of Gill FJ in *Comptroller-General of Inland Revenue, Malaysia v T* [1970] 2 MLJ 35 clearly supports the above proposition. In that case, it was held that:

> It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax. In this connection, Lord Blackburn said in the House of Lords in *Coltness Iron Company v Black* (1880–81) 6 App Cas 315 , 330:
>
> > No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. … and I think the only safe rule is to look at the words of the enactment and see what is the intention expressed by those words.
>
> Lord Simonds in *Russell v Scott* [1948] 2 All ER 1 , 5 reasserted the same rule of construction when he addressed the House of Lords in the following words:
>
> > My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the taxing statutes unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion.

[23] In the present case, the learned High Court judge held that ss 10(3) and 13(2) of the Free Zones Act 1990 by implication empower the Minister of Finance to impose the FCZ charges and the imposition of the said charges even prior to 27 April 2007 is not illegal.

[24] Section 10(3) of the Act provides:

> (3) Notwithstanding anything to the contrary in any written law, the Minister of Finance may allow any activity to be carried in a free zone subject to such conditions as he may deem fit to impose.

[25] Section 13(2) of the Act provides:

> (2) The Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone or for the purpose of protecting revenue; and the authority shall comply with such directions.

[26] We are of the view that the language of both ss 10(3) and 13(2) of the Act on the face of it does not show any intention on the part of the Parliament to confer on the Minister of Finance a discretion or power to impose any charge or levy in respect of activities carried in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ. Clearly, the provisions of ss 10(3) and 13(2) of the Act do not express in plain and unambiguous language the intention of Parliament to provide powers to the Minister to impose such charges in the free zone.

[27] That being the case, it necessarily follows that reg 8A of the Free Zones Regulations 1991 which came into force on 20 April 2007 (by way of *gazette* PU(A) 166/2007) is in turn ultra vires the Act. As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia* the well settled principle that a provision in statute conferring power on a member of the executive to enact subsidiary legislation particularly one that imposes a financial levy or charges upon any section of the public must be construed strictly. The power from any subsidiary legislation can never rise above that in its parent Act (see the Federal Court decision in *Kerajaan Malaysia v Wong Pet Heng & Anor* [1997] 2 CLJ 188).

[28] The power to give such directions for 'the purpose of protecting revenue' under s 13(2) of the Act should not be interpreted to include the power to impose charge for the FCZ. The words 'protecting revenue' as used in sub-s (2) must be read to refer to the activity by the authority 'to provide adequate enclosures to segregate a free zone from the principal customs area for the protection of revenue together with suitable provisions for the movement of persons, conveyances, vessels and goods entering or leaving a free zone' as stipulated under sub-s (4) of the same section. The words 'protecting revenue' must refer to the revenue of the government from collection of faxes by the customs relating to 'movement of persons, conveyances, vessels and goods entering or leaving the zone'. The relevant part of the Parliament's *Hansard* dated 16 March 1990 indicates the real intention of s 13 of the Free Zones Act

1990. There is no indication at all that sub-s (2) is meant to empower the Minister of Finance to impose charges on the members of AFAM including the appellants. The relevant part of the *Hansard* is reproduced below:

> Pasal ini juga mengenakan satu kewajipan ke atas pihak berkuasa untuk mengadakan kemudahan-kemudahan kepada pegawai-pegawai kastam bagi pengawasan yang sepatutnya ke atas barang-barang yang dibawa ke dalam atau keluar dari suatu zon bebas dan untuk menyediakan kepungan-kepungan yang mencukupi bagi mengasingkan suatu zon bebas dari kawasan utama kastam bagi perlindungan hasil dan juga mengawal pergerakan orang-orang, kenderaan-kenderaan, vesel dan barang-barang yang masuk dan keluar dari suatu zon bebas.

[29] Parliament may delegate some of the powers to a Minister or any administrative body; and such delegation must be confined to the express authority delegated to it. It is the duty of the court to carefully scrutinise the extent of the delegation particularly in cases which involves a right to impose any financial burden on a person or class of persons. This was clearly pronounced by McRuer CJ in the case of *Gruen Watch Co v Attorney General of Canada* [1950] OR 429 as follows:

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinised than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

(See also *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884).

[30] Based on the above mentioned considerations, we can safely conclude that the Minister of Finance has no legal power to impose charges on the members of AFAM (including the appellants) in relation of the FCZ in KLIA. Consequently the charges which were imposed on them as directed by the Ministry official in her letter dated 18 May 2007 were without legal basis and unlawful. On this ground alone, the appellants' appeal can be allowed and the decision of the learned High Court judge on this matter can be set aside.

[31] The issue as to whether reg 8A of the Free Zone (Amendment) Regulations 2007 which came into effect from 20 April 2007 and which forms the basis of the imposition of the FCZ charges, can have retrospective effect, was also raised before us. This issue is only relevant if we are to find that the said reg 8A is valid in law, but not otherwise. In the present case, we have earlier concluded that the said reg 8A is ultra vires the parent Act (the Free Zones Act 1990) and therefore invalid. Therefore the question whether reg 8A can be effective retrospectively does met arise. However, for completeness of these

grounds of judgment, we shall now deal with the issue assuming for a moment that the said reg 8A is legally valid and not ultra vires the parent Act.

[32] The said reg 8A first came into force on 20 April 2007 by way of *gazette* PU(A) 166/2007. Prior to that date, there was no other express provision in the parent Act or the 1991 Regulations regarding the imposition of free zone charges; and no such charges are legally payable until the amendment came into force. The first respondent, as the authority appointed by the Minister of Finance for the FCZ, claimed that as at 14 May 2007 (three weeks after the said reg 8A came into force on 20 April 2007) there were arrears of RM24,092,834 of the charges remained unpaid by the members of AFAM (including the appellants). Presumably, the arrears must have been related to unpaid FCZ charges imposed long before the effective date of 20 April 2007. The question is can the said reg 8A, assuming it to be legally valid be enforced retrospectively?

[33] Section 19(1) of the Interpretation Acts 1948 (Act 388) and 1967 provides:

> (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is so provided, the date immediately following the date of its publication in pursuance of section 18.

[34] Under s 20 of the same Act 388 'subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act — provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published'.

[35] Reading both ss 19–20 of the Act 388, it is crystal clear that the commencement of a subsidiary legislation (in our case — reg 8A) shall be the date provided in the Free Zone (Amendment) Regulations 2007. Since there is no specific date for commencement stated in the said regulations, then the commencement date for reg 8A must be the date immediately following the date of its publications ie 20 April 2007.

[36] If we are to invoke s 20 of the 388 Act, a subsidiary legislation can only be made to operate retrospectively under the said section if the retrospective commencement date is expressly stated in the subsidiary legislation itself. In the present case, no retrospective commencement date is provided for or stated in the said regulations. Therefore, the only conclusion that be drawn is that the commencement date of reg 8A must be on 20 April 2007, the date immediately following the date of its publication. Section 47 of the Free Zones Act 1990 which is the enabling section for the regulations also does not expressly confer any power to the Minister of Finance to legislate retrospectively. Therefore, the

inevitable conclusion that we can arrive at is that the said reg 8A, assuming it to be legally valid, can only came into force prospectively and not retrospectively.

[37] The Court of Appeal in the case of *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 had ruled that:

> In order to determine whether a written law is prospective or retrospective, the court must first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectively. The converse is true where the written law does not affect substantive rights.

[38] In this case of *Syed Ibrahim bin Syed Mohd & Ors v ESSO Production Malaysia Incorporated* [2004] 2 MLJ 49; [2004] 1 CLJ 880, the Court of Appeal held that 'a subsidiary legislation with retrospective effect would apply to procedural matters but not to a right'.

[39] In this respect we are in agreement with Mustapha Hussain J in the case of *United Asian Bank Bhd v The Negeri Sembilan Development Corporation* [1989] 1 MLJ 230 where His Lordship, held:

> The issue before the court is whether the bringing into retrospective effect of certain provisions of the law involved could have effect on a party's rights or obligations. This court is of the view that the law cannot be made retrospective to deprive the rights of a party that were legally enshrined by the relevant law at that point of time. It is most unfair to resort to retrospective enactments just to avoid a party's legal obligations.

[40] There are other authorities supporting the above proposition. In *Re Athlumney* [1898] 2 QB 547, Wright J said:

> Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation.
>
> (See also *Re Chapman* [1896] 1 Ch 323; and *Pardo v Bingham* (1868-1869) 4 LR Ch App 735).

[41] The issue of retrospective law was also expressed by Willes J in *Phillips v Eyre* (1870) LR 6 QB 1 at p 23:

> Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

[42] On the same issue, Prof MP Jain in his text book *Administrative Law of Malaysia and Singapore* (2nd Ed), 1989) at p 93 says:

> Parliament can enact laws with retrospective effect, but a subordinate legislator has to act within the limits of the power delegated to him, and a mere general power to make regulations does not empower him to make regulations with retrospective effect. The reason for this rule is that retrospective legislation disturbs vested rights of the people, and this only the Legislature should do.

[43] On the strength of the above authorities we were of the view that the power to impose and collect FCZ charges under reg 8A, which only came into force on 28 April 2007 cannot be enforced retrospectively. As the first respondent's counterclaim against the appellants consists of FCZ charges pre-dating back the Free Zone (Amendment) Regulations 2007, we conclude that the imposition of the said charges retrospectively by the first respondent prior to the effective date of 20 April 2007 is ultra vires the Act and the Regulations. The learned High Court judge had erred in allowing the first respondent's counterclaim against the appellants.

[44] The letter dated 18 May 2007 from one Datuk Aziyah Bahauddin, from the Ministry of Finance, cannot in any way be interpreted as an effective retrospective direction of the Minister of Finance. The learned High court judge had erred in concluding that the said letter as constituting an effective retrospective direction when such direction is ultra vires the Act and the Regulations. At most, the letter is merely an administrative communication between the official of the Ministry of Finance and the chairman of AFAM on the same subject matter. It is not a legal direction. It is also not, a subsidiary legislation. Obviously the said letter cannot be used as a basis for the imposition of the FCZ charges as has been done in the present case. The RM5 rate for each declaration form as imposed in the said letter and the amount of RM24,092,834 alleged to be arrears of the FCZ charges clearly have no legal effect and do not create any liability on the members of AFAM (including the appellants) to pay.

CONCLUSION

[45] Based on the above considerations, we are satisfied that the learned High Court judge had erred in dismissing the appellant's claim and allowing the first respondent's counterclaim against the appellants. We therefore unanimously allow the appeal with costs of RM50,000 (here and below) to the appellants and the deposit to be refunded to the appellants. The decision of the

learned High Court judge is hereby set aside. Consequently, we make an order allowing the appellant's application as per prayers (a)–(d) of the appellant's claim.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed